

No. 12068

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United States  
Court of Appeals  
For the Ninth Circuit

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FRANK M. SIEGMUND,

Appellant,

vs.

GENERAL COMMODITIES CORPORATION,  
LIMITED, WM. H. HEEN, ERNEST K. KAI  
and THELMA M. AKANA,

Appellees.

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APPELLEES' MOTION TO DISMISS APPEAL  
and  
APPELLEES' BRIEF ON APPEAL

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Appeal from the United States District Court  
for the District of Arizona

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FILED

JAN 25 1949

RAWLINS, DAVIS, CHRISTY &  
KLEINMAN,

Attorneys for Appellees.

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CLERK





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IN THE  
United States  
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For the Ninth Circuit

FRANK M. SIEGMUND,

Appellant,

vs.

GENERAL COMMODITIES CORPORATION,  
LIMITED, WM. H. HEEN, ERNEST K. KAI  
and THELMA M. AKANA,

Appellees.

APPELLEES' MOTION TO DISMISS APPEAL  
and  
APPELLEES' BRIEF ON APPEAL

MOTION TO DISMISS APPEAL

The Appellees, General Commodities Corporation, Limited, Wm. H. Heen, Ernest K. Kai and Thelma M. Akana, respectfully move the United States Circuit Court of Appeals to dismiss the appeal of the Appellant, Frank M. Siegmund, in the above-entitled matter, upon the grounds hereinafter set forth.



## GROUND NUMBER I.

### JURISDICTION OF CIRCUIT COURT OF APPEALS

The Circuit Court of Appeals is without jurisdiction to entertain said purported appeal, for the reason that the order attempted to be appealed from is not a final appealable order.

### STATUTE INVOLVED

Section 128 of the Judicial Code (43 Stat. L., 936, U.S.C.A. Title 28, Section 225) provides:

“Appellate Jurisdiction—(a) Review of final decisions.

The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions—

First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under Section 345 of this title.”

### STATEMENT OF FACTS INVOLVED

The action involved was brought in the District Court by Frank M. Siegmund, as plaintiff, against General Commodities Corporation, Limited, Wm. H. Heen, Ernest K. Kai, Thelma M. Akana, W. T. Davis, The Black Corporation, and The White Corporation, as defendants. The present appeal (R. 69) was taken by the Appellant, Frank M. Siegmund, from an order (R. 68) of the District Court dismissing the action as to the defendants, General Commodities Corporation, Limited, Wm. H. Heen, Ernest K. Kai and Thelma M. Akana, who are Appellees herein. The



action still stands in the District Court as against the defendants, W. T. Davis, The Black Corporation and The White Corporation.

The complaint (R. 2 to 16) is based primarily upon a written contract entered into between the General Commodities Corporation, Limited, and the plaintiff, under which said corporation employed plaintiff to act as its sales representative, and agreed to pay him a percentage of any net profit made in dealing in certain war surplus commodities. (R. 3 to 6)

Briefly stated, the substance of the complaint, after setting out the contract, is as follows: That the defendants, Wm. H. Heen, Ernest K. Kai, Thelma M. Akana and W. T. Davis, organized the defendant corporation, General Commodities Corporation, Limited, (R. 13) and are its officers; (R. 15) that the defendants, The Black Corporation and The White Corporation, are subsidiary corporations which have been, or are to be organized by the defendant, General Commodities Corporation, Limited; (R. 9) That, through plaintiff's efforts, substantial profits have been made, and will be made in the future by the defendant, General Commodities Corporation, Limited; (R. 7, 8 and 9) That plaintiff is entitled to be paid a percentage of such profits under the terms of said contract, but that the defendant, General Commodities Corporation, Limited, has refused to account to, or pay plaintiff any part thereof; (R. 8 and 9) That the defendants have conspired together to defraud the plaintiff of his rights and the payments due him under said contract by diverting all of the net profits made by said corporation to the defendants, Wm. H. Heen, Ernest K. Kai, Thelma

M. Akana and W. T. Davis; (R. 14 and 15) That upon completion of said transactions said corporation will be dissolved and divested of all its assets; (R. 13) That plaintiff has been damaged thereby in the sum of Two Million Dollars. (R. 15) The complaint then prays judgment against all of the defendants jointly for the sum of Two Million Dollars, and for an accounting from the defendants, and certain ancillary relief. (R. 11 and 15) A more detailed statement of the contents of the complaint is found at pages 10 to 14 of Appellee's Brief, following the present motion.

The action, as to all of the defendants, arises out of the same subject matter, and it is sought to hold all of the defendants jointly liable therein. The present appeal has been taken by Appellant notwithstanding that the action still remains standing in the District Court as to the defendants, W. T. Davis, The Black Corporation and The White Corporation. (R. 68-69)

## POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS

### POINTS OF LAW

Where the action arises out of the same principal subject matter as against all of the defendants, and the relief sought is against all of the defendants jointly, an order dismissing the action as to only part of the defendants is an interlocutory order and not a final order or judgment from which an appeal can be taken.

The action seeks to recover against all of the defendants jointly upon the same principal facts or subject matter. Under the circumstances the District

Court's order dismissing the action as to only part of the defendants, and leaving the action standing as to the other defendants, is not a final appealable order, and the Appellant's attempted appeal therefrom should be dismissed for the reason that this Appellate Court is without jurisdiction to entertain such purported appeal.

## AUTHORITIES

The foregoing proposition of law, and its application to the facts in the present appeal are amply sustained by the following authorities:

Hohorst vs. Hamburg-American Packet Co., 148 U.S. 262, 13 Sup. Ct. 590, 37 L.Ed. 443;

National Bank of Rondout, N. Y., vs. Smith, 156 U.S. 330, 15 Sup. Ct. 358, 39 L. Ed. 441;

Kuhn, et al, vs. Canteen Food Service, Inc., et al, 150 Fed. (2) 55, (7th Ct.);

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Moss, et al, vs. Kansas City Life Insurance Co., 96 Fed. (2) 108, (8th Ct.);

Fields, et al, vs. Mutual Benefit Life Insurance Co., 93 Fed. (2) 559, (4th Ct.);

Bush, et al, vs. Leach, et al, 22 Fed. (2) 296, (2nd Ct.).

The rule is also followed in the State Courts when similar appeal statutes are involved. See:

Beavers vs. Beavers, 55 Ariz. 122, 99 Pac. (2) 95; and Annotations in 80 A.L.R. at 1186, and 114 A.L.R. at 759.

## GROUND NUMBER II

That Appellant has failed to set forth in his brief any specifications of error as required by the rules of this Appellate Court, and no questions of error are presented for review.

## RULE INVOLVED

Rule 20, Sub-division 2(d), of the rules of this Appellate Court provides:

“\*\*\*\* 2. This brief shall contain, in order here stated— \* \* \* \* \*

(d) In all cases save those of admiralty, a specification of errors relied upon which shall be numbered and shall set out separately and particularly each error intended to be urged.”

## POINTS AND AUTHORITIES

Since no specifications of error are set forth in Appellant's Brief, no question of error is presented to this Court for review. This Appellate Court has repeatedly held that where the alleged error is not specified in Appellant's Brief, as required by said rule, such error will not be considered. See the following recent cases:

United States v. Cushman, 136 F. 2d 815 at 817 (9th Ct.);

Chapman Bros. Co. v. Security-First Nat. Bank, 111 F. 2d 86 at 88 (9th Ct.);

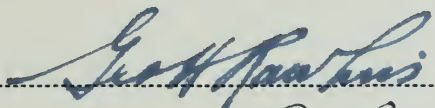
Southern Pac. Co. v. Humphrey, 97 F. 2d 29 at 30 (9th Ct.);

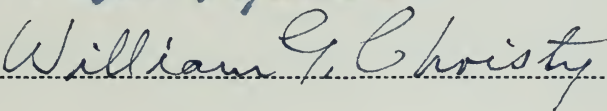
Century Indemnity Co. v. Nelson, 90 F. 2d 644 at 646 and 647 (8th Ct.) ;

Muyres v. United States, 89 F. 2d 793 at 784 (9th Ct.).

It is respectfully submitted that the order attempted to be appealed from is not a final appealable order, and this Appellate Court is without jurisdiction of such purported appeal; That in the absence of specifications of error in Appellant's Brief, no question of error is presented; That the appeal should be dismissed for said reasons.

RAWLINS, DAVIS, CHRISTY & KLEINMAN,

By  .....

By  .....

Attorneys for Appellees



## APPELLEES' BRIEF

### JURISDICTION OF DISTRICT COURT

The District Court was without jurisdiction as to the defendants (Appellees herein), General Commodities Corporation, Limited, Wm. H. Heen, Ernest K. Kai and Thelma M. Akana, in said action, as hereinafter more fully appears.

### STATUTES INVOLVED

The Judicial Code, Section 24, as amended (Title 28 United States Code, Title 28, Section 41 (1), provides as follows:

“Original jurisdiction. The district courts shall have original jurisdiction as follows:

(1) United States as Plaintiff; Civil suits at common law or in equity. First. Of all suits of a civil nature, at common law or in equity, \* \* \* where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000, and \* \* \* \* \*

(b) is between citizens of different States, or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any State or Territory, \* \* \* \* \*.”

### CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Article III, Section 2, Sub-section 1, provides:

“The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their au-

thority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects."

### QUESTIONS PRESENTED

1. Is the Act of Congress of April 20, 1940, amending Section 24, Subdivision 1, of the Judicial Code (U.S.C. Section 41) in conflict with the provisions of Article III, Section 2, Subdivision 1, of the Constitution, insofar as said act purports to confer jurisdiction on the United States District Court for the District of Arizona in an action by a citizen of said state against a citizen of the Territory of Hawaii?

2. Does the complaint state a cause of action against the defendants, Wm. H. Heen, Ernest K. Kai and Thelma M. Akana, Appellees herein?

3. Can a party to a contract with a corporation, providing that he is to be paid as commissions a percentage of the net profits on sales made by the corporation, maintain an action against the officers of the corporation, who are not parties to the contract, merely because the corporation refuses to pay such commissions and the officers have or will divert the net profits of the corporation to themselves, where such party has not first exhausted his remedies against the corporation and the corporation is not insolvent?



## STATEMENT OF THE CASE

The action was commenced in the United States District Court for the District of Arizona, by Frank M. Siegmund, as plaintiff, against General Commodities Corporation, Limited, an Hawaiian corporation, W. T. Davis, The Black Corporation, The White Corporation, Wm. H. Heen, Ernest K. Kai and Thelma M. Akana, as defendants. (R. 2)

As jurisdictional averments, the complaint alleges: That the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars; (R. 3) That the Plaintiff, Frank M. Siegmund, is a resident and citizen of the State of Arizona; That the defendant, General Commodities Corporation, Limited, is a corporation organized and existing under the laws of the Territory of Hawaii, and a citizen of said territory; That the defendant, W. T. Davis, is a resident and citizen of the State of California; That the defendants, The Black Corporation and The White Corporation, are non-resident, foreign corporations; That the defendants, Wm. H. Heen, Ernest K. Kai and Thelma M. Akana, are residents and citizens of the Territory of Hawaii. (R. 2-3)

The complaint attempts to set forth two causes of action arising out of the same subject matter, in each of which it is sought to hold all of the defendants jointly liable. The first cause of action (R. 2 to 12) is in substance as follows:

That the plaintiff entered into a written contract with the defendant, General Commodities Corporation, Limited, under the terms of which plaintiff was

appointed as said corporation's sales representative in the United States for the purpose of selling certain surplus commodities to be purchased by said corporation from the Republic of China, and that the plaintiff was to be paid for his services commissions of twenty percent of the net profits derived from such sales by said corporation. (R. 3 to 6) That pursuant to said contract, plaintiff secured customers for, and negotiated the sale of large quantities of such commodities, from which the defendant, General Commodities Corporation, Limited, has received, and in the future will receive substantial net profits, and that twenty percent of such net profits will be in excess of Two Million Dollars. That the General Commodities Corporation, Limited, has refused to account to plaintiff, or to pay him any part of such profits. (R. 7, 8 and 9) That by reason of the refusal of the defendants to comply with said contract, plaintiff is damaged in the amount of Two Million Dollars. (R. 9) That the records and the proceeds and net profits of said sales are in the custody and control of the defendants, General Commodities Corporation, Limited, The Black Corporation, and The White Corporation, and constitute their principal assets. That a substantial portion of said moneys and net profits are within the jurisdiction of the Court, and that said moneys and net profits are being dissipated by said corporations, and will be removed from the court's jurisdiction, unless a receiver is appointed to take charge of same. (R. 10-11) Judgment is then prayed against the defendants in substance, as follows: That an account be taken of all of said transactions; that the rights and duties of the

plaintiff and said defendant corporations under said contract be determined; that a receiver be appointed to take over all the property and assets of said corporations; that plaintiff have specific performance of said contract; and that plaintiff have damages against the defendants, and each of them in the amount of Two Million Dollars. (R. 11-12)

The second cause of action replays by reference the major portions of the first cause of action, (R. 12-12) and, in substance, further alleges: That the defendants, General Commodities Corporation, Limited, was formed by the defendants, W. T. Davis, Wm. H. Heen, Ernest K. Kai and Thelma M. Akana, for the purpose of carrying out the transactions referred to in said contract, and that upon completion of said transactions, said corporation will be dissolved and divested of its assets; (R. 13) That said defendants are engaged in a conspiracy to defraud the plaintiff of his rights and the payments due him under said contract, by causing the net profits of said transactions to be distributed to the defendants, W. T. Davis, Wm. H. Heen, Ernest K. Kai and Thelma M. Akana; That a substantial portion of said net profits have been distributed to said last named defendants, and that future distribution of all of said net profits will be made to said last named defendants; (R. 14-15) That said defendants, W. T. Davis, Wm. H. Heen, Ernest K. Kai and Thelma M. Akana, are officers of the corporation defendant, General Commodities Corporation, Limited; (R. 15) That by reason of the defendants' said acts, the plaintiff has been damaged in the sum of Two Million Dollars. (R. 15) Judgment is then prayed against the de-

endants, and each of them, in the amount of Two Million Dollars. (R. 15-16)

Service was attempted to be obtained on the defendant, General Commodities Corporation, Limited, by serving its officer, W. T. Davis, when in the State of Arizona. No service was obtained upon the defendants, The Black Corporation and The White Corporation. The defendants, W. T. Davis, Wm. H. Heen, Ernest K. Kai and Thelma M. Akana, were each personally served when temporarily in the State of Arizona. (R. 17a-17b)

The defendant, General Commodities Corporation, Limited, then filed a Motion to Quash the Return of Summons as to it, and to dismiss the action upon the grounds that the District Court was without jurisdiction of the action and of said defendant, in that it was a corporation organized and existing under the laws of the Territory of Hawaii, and not a resident or citizen of any state, and that said action was not a controversy between citizens of different states and that it was not doing business in the State of Arizona, and was not subject to service of process therein. (R. 58-59)

The defendants, W. T. Davis, Wm. H. Heen, Ernest K. Kai and Thelma M. Akana, filed joint Motions to Quash the Return of Service of Summons on them, and to dismiss said action as to each of them, upon the grounds that the District Court was without jurisdiction of the action, in that the defendants, General Commodities Corporation, Limited, Wm. H. Heen, Ernest K. Kai and Thelma M. Akana, were all residents and citizens of the Territory of Hawaii,



and not citizens of different states, and upon the further ground that said complaint failed to state a claim upon which relief could be granted as against said defendants. (R. 56-57)

The District Court dismissed the action as to the defendants, General Commodities Corporation, Limited, Wm. H. Heen, Ernest K. Kai and Thelma M. Akana, but denied the motion of W. T. Davis, and the action still stands in the District Court as against the defendants, W. T. Davis and The Black Corporation and The White Corporation. (R. 68) The present appeal has been taken by the plaintiff, Frank M. Siegmund, from that portion of the order which dismissed the action against said first mentioned defendants. (R. 69)

## ARGUMENT

### POINT OF LAW NUMBER I.

The Act of Congress of April 20, 1940, amending Section 24, Subdivision 1, of the Judicial Code (U.S.C. Section 41) is in conflict with the provisions of Article III, Section 2, Sub-division 1, of the Constitution, insofar as said act purports to confer jurisdiction on the United States District Court for the District of Arizona in an action by a citizen of said state against a citizen of the Territory of Hawaii.

Appellant, to establish jurisdiction of the District Court in the action, as against the Appellees, relies on diversity of citizenship between Appellant, as a citizen of the State of Arizona, and the Appellees, as citizens of the Territory of Hawaii, basing same on the provisions of Section 24, Sub-division 1, of the

Judicial Code (U.S.C. Section 41), as amended by the Act of Congress of April 20, 1940. It is the contention of Appellees that the power of Congress to confer jurisdiction on the United States District Courts in the various states must arise from the provisions of Article III, Section 2, Sub-division 1, of the Constitution. This provision is the basic source of the Federal judicial power, insofar as the jurisdiction of United States District Courts in the various states are concerned, and since this provision specifically enumerates the type of cases to which the Federal judicial power shall extend, such power extends only to such cases and none other. While this provision states that the judicial power shall extend to controversies between citizens of different states, it does not provide that the judicial power shall extend to controversies between citizens of a state and citizens of a territory. In the absence of such constitutional grant of power, Congress acted in excess of its authority in attempting to confer jurisdiction on the District Courts in the various states in cases between citizens of a state and citizens of a territory.

In attempting to meet this situation, Appellant first argues that the phrase "between citizens of different states" should be construed to mean between citizens of a state and citizens of a territory." However, the provision is clear and un-ambiguous, and leaves no room for the construction urged by Appellant. The Constitution throughout differentiates between states and territories. The control of Congress over the territories is granted by separate and specific provisions of the Constitution. The Federal Courts have uniformly recognized the distinction be-

tween states and territories, as appears from the decisions later set out in this brief.

Appellant, evidently recognizing the weakness of his position, further urges that Article IV, Section 3, Sub-section 2, of the Constitution grants Congress the power to confer jurisdiction on the District Courts in cases of the type under consideration. This provision reads as follows:

“The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States;”

this provision clearly relates only to “the territory or other property belonging to the United States,” and does not pertain to the states or the District Courts in the states. Whatever may be the powers granted thereunder to Congress over the territories, the provision does not purport to be a general grant of power to legislate on all matters pertaining to the states. This is particularly true in regard to a matter where the Constitution has specifically enumerated the powers granted, as in Article III, Section 2, Sub-section 1. If the general provisions of the Constitution were not limited by the specific provisions thereof, the specific provisions would be meaningless, and just so much surplusage. Further, it is elementary that all powers not granted to the United States by the Constitution are reserved to the States. The Tenth Amendment to the Constitution expressly provides:

“Rights reserved to states or people. The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are



reserved to the states respectively, or to the people.”

The United States Supreme Court has always strictly construed constitutional provisions and judiciary acts relating to diversity jurisdiction. In the case of *City of Indianapolis vs. Chase National Bank*, 314 U.S. 63, 62 S. Ct. 15, 86 L. Ed. 47, that court said:

“Though variously expressed in the decisions, the governing principles are clear. To sustain diversity jurisdiction there must exist an ‘actual’,” *Helm v. Zarecor*, 222 U.S. 32, 36, S.Ct. 10, 11, 56 L.Ed. 77, ‘substantial’, *Niles-Bement-Pond Co., v. Iron Moulders’ Union*, 254 U.S. 77, 81, 41 S.Ct. 39, 41, 65 L.Ed. 145, controversy between citizens of different states, all of whom on one side of the controversy are citizens of different states from all parties on the other side. *Strawbridge v. Curtiss*, 3 Cranch 267, 2 L.Ed. 435. \* \* \* \* \*

These requirements, however technical seeming, must be viewed in the perspective of the constitutional limitations upon the judicial power of the federal courts, and of the Judiciary Acts in defining the authority of the federal courts when they sit, in effect, as state courts. See *Madisonville Traction Company v. St. Bernard Mining Company*, 196 U.S. 239, 255, 25 S.Ct. 251, 257, 49 L.Ed. 462 and *Ex parte Schollenberger*, 96 U.S. 369, 377, 24 L.Ed. 853. The dominant note in the successive enactments of Congress relating to diversity jurisdiction is one of jealous restriction, of avoiding offense to state sensitiveness, and of relieving the federal courts of the over-whelming burden of “business that intrinsically belongs to the state courts” in order to keep them free for their distinctive federal

business. See *Friendly*, *The Historic Basis of Diversity Jurisdiction*, 41 Harv. L. Rev. 483, 510; *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108, 109, 61 S.Ct. 868, 85 L.Ed. 1214; *Healy v. Ratta*, 292 U.S. 263, 270, 54 S.Ct. 700, 703, 78 L.Ed. 1248. 'The policy of the statute (conferring diversity jurisdiction upon the district courts) calls for its strict construction. The power reserved to the states, under the Constitution (Amendment 10), to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution (Article 3). \* \* \* Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.' *Healy v. Ratta*, *supra*, 292 U.S. at page 270, 54 S.Ct. at page 703, 78 L.Ed. 1248.

Since the early decision of Chief Justice Marshall in *Hepburn and Dundas v. Ellzey*, 2 Cr. 445, 6 U.S. 445, 2 L.Ed. 332, the United States Supreme Court has consistently held that a citizen of a territory is not a citizen of a state within the meaning of Article III, Section 2, of the Constitution. While the Supreme Court has not as yet passed directly on the question of the constitutionality of the 1940 amendment to Section 24 (1) of the Judicial Code (28 U.S.C. Section 41(1) the question has been presented before other federal courts, and the majority of these have held the 1940 amendment unconstitutional. These decisions are as follows:

*Central States Cooperatives v. Watson Bros. Transportation Co.*, 165 F.2d 392 (CCA7);

National Mutual Insurance Co. of the District of Columbia v. Tidewater Transfer Co., Inc., of Virginia, 165 F. 2d 531, (CCA4);

Behlert v. James Foundation of N.Y., 60 F. Supp. 706 (S.D., N.Y.);

McGarry v. City of Bethelhem, 45 F. Supp. 385, (E.D., Pa.);

Ostrow v. Samuel Brilliant Co., 66 F. Supp. 593 (D.C., Mass.);

Wilson v. Guggenheim, 70 F. Supp. 417 (E.D.S. Car.).

The only decisions found to the contrary are the following district court cases:

Winkler v. Daniels, 43 F. Supp. 265 (E.D. Va.);  
Glaeser v. Acacia Mutual Life Association, 55 F. Supp. 925 (N.D., Calif);

Duze v. Woolley, 72 F. Supp. 422 (D. Hawaii).

The two cases from the Fourth and Seventh Circuit Courts of Appeal above cited give an excellent review of the decisions of the United States Supreme Court bearing on the question here presented. We believe that it is clear therefrom that the power of Congress to confer jurisdiction on the District Courts in the various states is restricted to the cases enumerated in Article III, Section 2, of the Constitution, and that the Act of Congress of April 20, 1940, exceeds that power and is unconstitutional.

## POINT OF LAW NUMBER II.

A party to a contract with a corporation providing that he is to be paid as commissions a percentage of the net profits on sales made by the corporation, cannot maintain an action against

the officers of the corporation, who are not parties to the contract, merely because the corporation refuses to pay such commissions and the officers have or will divert the net profits of the corporation to themselves, where such party has not first exhausted his remedies against the corporation and the corporation is not insolvent.

Aside from the jurisdictional questions involved, the complaint sued on in the action fails to state a cause of action as against the defendants, Wm. H. Heen, Ernest K. Kai and Thelma M. Akana, and the District Court's order dismissing the action as to them was proper. The theory of plaintiff's complaint is that these last named defendants, while not parties to the contract sued on, are officers of the defendant corporation, General Commodities Corporation, Limited, and have diverted a portion of the net profits of that corporation to themselves, and in the future will divert all of the net profits of said corporation to themselves, and plaintiff, by reason thereof, will be unable to collect his commissions due him on sales made by said corporation. Plaintiff simply assumes that he has a vested interest or ownership in the net profits of said corporation, whereas the facts alleged show him to be a mere contract creditor. It is not alleged that the defendant corporation is insolvent, but on the contrary it appears from the allegations of the complaint that said corporation has in the past, and will in the future make immense profits. The allegations that a portion of the net profits of the corporation have been diverted to the officers, and that all the net profits will be diverted to them in the future, indicates that the corporation is presently solvent, and that the



plaintiff will suffer no damage until some time in the future. Unless the corporation is insolvent, the plaintiff has no interest in the assets of the corporation, whether net profits or otherwise, and the officers of the corporation owe him no duty in regard thereto. It is well settled that before a mere creditor can take action against the officers or stockholders of a corporation, the creditor must first establish his claim and exhaust his remedies against the corporation itself, and must further show that the corporation is insolvent. The following cases fully sustain this proposition:

Hollins v. Brierfield Coal & Iron Co., 150 U.S. 371, 14 Sup. Ct. 127, 37 L.Ed. 1113;

McDonald v. Williams, 174 U.S. 397, 19 S.Ct. 743, 43 L.Ed. 1022;

New Hampshire Sav. Bank v. Richey, 121 Fed. 956 (8th Ct.);

Bates v. Brooks, 270 N.W. 867, 222 Iowa 1128.

This last case gives an exhaustive discussion of the state and federal decisions bearing on this question. We believe that it is clear that plaintiff's complaint fails to state any cause of action as against the defendants, Wm. H. Heen, Ernest K. Kai and Thelma M. Akana.

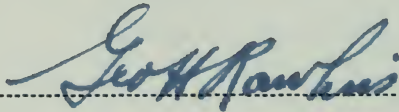
## CONCLUSION

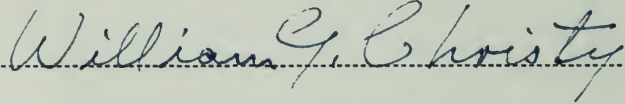
It is respectfully submitted that the Act of Congress of April 20, 1940, amending Section 24 (1) of the Judicial Code, is unconstitutional, and that the District Court was without jurisdiction of the action as against the defendants, General Commodities Corporation, Limited, Wm. H. Heen, Ernest K. Kai

and Thelma M. Akana, and the action was properly dismissed as to them; Further that the complaint fails to state a cause of action against the defendants, Wm. H. Heen, Ernest K. Kai and Thelma M. Akana, and the action was also properly dismissed as to them for that reason; That the order of the District Court appealed from should be affirmed, and said appeal dismissed.

Respectfully submitted,

RAWLINS, DAVIS, CHRISTY & KLEINMAN,

By 

By 

Attorneys for Appellees.